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IN THE

Supreme Court of the United States

October Term, 1964

No. 251

FRANK URSICH,

Petitioner,

vs.

MANUEL G. DA ROSA, ANTONIO GARCIA DA ROSA, MARIA A. ROSA, VICTORINO GARCIA DA ROSA AND MARY ROSA SANTOS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming a judgment of the United States District Court for the Southern District of California, Central Division, based upon a jury verdict for the respondents (defendants below) and against petitioner (plaintiff below) in an action for personal injuries under the Jones Act.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 329 F. 2d 794 (1964) and is set forth in Appendix A to this petition. No written opinion was rendered by the trial court.

Jurisdiction.

The jurisdiction of the district court is based upon the Jones Act, 41 Stat. 1007, 46 U. S. C. 688, and upon its admiralty and maritime jurisdiction pursuant to Article III, Section 2, of the United States Constitution and 28 U. S. C. 1333. The Judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on February 26, 1964. (App. B, p. 10.) Its jurisdiction is based upon 28 U. S. C. 1291.

A timely Petition for Rehearing was filed and denied on April 7, 1964. (App. C, p. 11.) The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Whether in a Jones Act case, where the doctrine of *res ipsa loquitur* is applicable, that doctrine merely permits the drawing of an inference of negligence, or whether it compels such an inference subject to that inference being overcome by evidence sufficient to meet or balance it.

2. Whether, in an action for injuries received when petitioner was hit by a falling fish being handled by and under the exclusive control of a fellow crew member the court erred in instructing the jury that no inference of negligence could be drawn from the mere happening of the accident itself.

3. Where, in a Jones Act case, the evidence establishes without dispute that the respondent fishing vessel owners had exclusive control of a fish and that said fish was dropped by respondents and struck respondents' employee, petitioner, does the fact that the respondents introduce testimony of several possible causes of the fish falling, at least one of which would constitute negligence,

render inapplicable the doctrine of *res ipsa loquitur?*

4. Is the answer to the above question affected by the fact that the explanation itself shows that the manner in which the work leading to the accident was done was such that the fish dropping reasonably could have been anticipated to result therefrom, particularly where accompanied by the admission that the work could have been done in such a manner as to avoid this hazard?

Statutes Involved.

The action was brought under the Jones Act, 41 Stat. 1007, 46 U. S. C. 668 (App. D, p. 12.) The issues presented here do not relate to the language of that statute; no other statute is here involved.

Statement of the Case.

The following facts are undisputed and are substantiated by the witnesses called by both parties:

The petitioner, while employed as a fisherman aboard respondents' fishing vessel "Portuguesa", was engaged together with a fellow fisherman, Druskovich, in discharging fish from a tank of said vessel. [R. 15, 103, 24-25, 76-77, 104.][1] Large fish were removed from the tank by a rope sling placed around their tails; smaller fish, in buckets. [R. 26, 28, 78.]

Petitioner was standing in the opening of the tank, about two and one-half to three feet square, alongside a bucket which he had filled, awaiting its removal by means of a winch. [R. 33, 79-85, 109.] The petitioner was working where he had been assigned, was doing his

[1]References to the record ["R"] are to the pages of the Reporter's Transcript in the trial court. References to ["C"] are to the pages of the Clerk's Transcript in the trial court.

job in a proper manner, and did nothing which caused the accident. [R. 114.]

A fellow crew member, Druskovich, was working on the deck above and several feet from petitioner. [R. 84-85.] While lifting a fish weighing between 130 and 140 pounds by picking it up by its tail with one hand and a hook inserted in an eye of the fish with the other hand, Druskovich dropped the fish and it struck petitioner, injuring him. [R. 32-33, 106, 108-109, 115.] Petitioner offered no evidence as to what caused Druskovich to drop the fish.

The respondents offered testimony that the fish was handled in the customary manner and that even when it was handled in such customary manner a fish gets loose and drops a couple of times a day; the accident could have occurred because the eye of the fish was soft and the hook pulled out, or because the bones of the fish broke, or because the hook broke. [R. 108, 119-121.] There was no evidence as to which, if any, of the possibilities was the cause of the accident. [R. 121.]

The testimony established without contradiction that the proper way to place the hook in the eye of a tuna is to place it under the bones in the eye, in order to prevent it from slipping out. [R. 88-91, 137-138, 141.] There was no evidence to the effect that Druskovich had done this with the fish that fell.

Druskovich, respondents' only witness, conceded that with big fish, for safety purposes, a sling is sometimes used instead of a hook. [R. 119.] Moreover, Druskovich admitted that he knew he was handling the fish in such a manner that it might fall and that he did nothing to prevent it. [R. 128.]

Petitioner requested the trial court to give his proposed instruction No. 17 to the effect that from the happening of the accident, the jury was required to infer some negligent conduct on the part of the respondents, and that respondents had the burden of going forward to meet or balance this inference by evidence either showing a cause for the accident and respondents' lack of negligence with respect thereto or by evidence showing such care on the part of the respondents as to negate negligence by them even though the cause was unknown.[2]

Respondents objected thereto on the ground that they had offered an explanation of the accident and that, therefore, the *res ipsa* doctrine did not apply. The objection was sustained. [R. 161-163, 194.]

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[2]The proposed instruction reads:

"From the happening of the accident involved in this case, an inference arises that a proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence and unless there is contrary evidence sufficient to meet or balance it, the jury should find in accordance with the inference.

"When there is any evidence to the contrary, you must weigh all of the evidence bearing upon the issue of defendant's negligence. If the evidence tending to prove that the accident was caused by a failure of the defendant to exercise the care required of him has greater weight than the evidence to the contrary, you will find in favor of the plaintiff on that issue.

"In order to meet or balance the inference of negligence, the defendant must present evidence to show either (1) a satisfactory explanation of the accident, that is, a definite cause for the accident, in which there is no negligence on the part of the defendant, or (2) such care on the defendant's part as leads to the conclusion that the accident did not happen because of want of care by him, but was due to some other cause, although the exact cause may be unknown. If such evidence has at least as much convincing force as the inference and other evidence, if any, supporting the inference, then you will find against the plaintiff on that issue." [C. 14-A.]

The trial court, over petitioner's objections that the instruction was not applicable where under the evidence the *res ipsa loquitur* doctrine applies, gave respondents' instruction No. 27-A:

> "The mere fact that an accident happened, considered alone, does not as a rule permit the jury to draw the inference that the accident was caused by someone's negligence." [R. 156-158, 188, 194.]

The jury returned a verdict for the respondent on which the court entered judgment. [C. '15-16.] A timely appeal was taken [C. 17] and on appeal the judgment was affirmed. (Apps. A and B.)

The Court of Appeals, while it expressed doubt about the applicability of *res ipsa* in the light of the "direct evidence" offered by respondents as to its cause, did not reach that question. (App. A, pp. 5-6.)[3] Rather, enunciating a proposition which had been argued neither in the trial court nor on appeal, the Court of Appeals held that the *res ipsa* instruction requested by petitioner incorrectly stated the law in that, as framed, it did not make the inference of negligence merely permissive and thus subject to rejection, even in the absence of evidence to meet or balance it. (App. A, pp. 6-7).

The giving over objection of the instruction that as a rule an inference of negligence may not be drawn from the mere fact that an accident happened, considered alone, was held not prejudicial even if *res ipsa*

[3]This Court may exercise its discretion and pass upon the question not reached below. *Weyerhauser SS Co. v. Nacirema Co.*, 355 U. S. 563, 569; *McAllister v. Magnolia Petroleum Co.* 357 U. S. 221, 226. Petitioner urges that the Court's discretion should be so exercised concurrently with consideration of the important issues which were passed upon.

was applicable because the instruction would have been proper as an introduction to a *res ipsa* instruction. (App. A, pp. 7-8.) This point was not urged by the respondents, their argument being limited to the proposition that the instruction was proper because *res ipsa* was inapplicable.

Petitioner urged on rehearing that the holdings on issues which had not been argued to the Court should be reconsidered with the benefit of briefs and argument from counsel. The Petition for Rehearing was denied on April 7, 1964, and this application for certiorari follows.

Reasons for Granting the Writ.

Certiorari is sought here on the grounds that the court below has decided important questions of federal law in a way in conflict with applicable decisions of this Court. Although the *holdings* of this Court are contrary to the *holdings* of the Court of Appeals here, there are apparent inconsistencies in the *language* of various decisions of this Court on the matters passed upon below; these differences in language relate to important questions of federal law, lead to inconsistent applications of the law and should be clarified. In addition, the decision below is in conflict with decisions of other courts of appeals on the same matters. These important questions affect the administration of the Jones Act which itself expresses an important public policy.

There has been much confusion concerning the application under federal law of the doctrine of *res ipsa loquitur*. The English cases beginning with those upon which this Court based its early decisions and continu-

ing to the present time[4] and leading cases decided by this Court[5] hold that the doctrine creates an inference or a presumption which, while it does not shift the burden of proof, must be met or balanced by the defendant's proof that no negligence of his caused the accident.

The principal case relied on below, *Sweeney v. Erving*, 228 U. S. 233 (1913), holds only that *res ipsa* does not shift the burden of proof but it goes on to use language which is clearly susceptible of the construction that the inference may be rejected even though no evidence relating to the absence of negligence is introduced. This *language* has been picked up in three other Supreme Court cases,[6] wherein the *holdings* relate to other aspects of the doctrine.

The *Jesionowski* and *Johnson* cases were relied on by the court below without any consideration either of their dicta aspects or of the definite holdings in other Supreme Court cases supporting petitioner's position,

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[4]*Christie v. Griggs*, 170 Eng. Rep. 1088, 2 Camp. 79. *Byrne v. Boadle*, 159 Eng. Rep. 299. Halsbury's, *Laws of England* (3rd ed. 1959), Vol. 28, page 80. *Kearney v. The London, Brighton & South Coast Ry. Co.*, 5 Q.B. 411 (1870), aff'd 6 Q.B. 759 (1871). *Scott v. London & St. Katherine Docks Co.*, 159 Eng. Rep. 665 (1865). Frederick Pollock, *The Law of Torts* (London Ed. 1887), pages 421-2. *Moore v. R. Fox & Sons* [1956], 1 All E.R. 182 (C. A. 1955). *Walsh v. Holst & Co., Ltd.*, 3 All E.R. 33 (C. A. 1958). *Great Western Ry. Co. of Canada v. Braid*, 15 Eng. Rep. 640 (1863).

[5]*Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115 (1839). *New Jersey RR & Transp. Co. v. Pollard*, 22 Wall. 341, 22 L. ed. 877 (1875.) *Inland and Seaboard Coasting Co. v. Tolson*, 139 U. S. 551 (1891). *San Juan Light & T. Co. v. Requena*, 224 U. S. 89 (1912). *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435 (1891). *Southern R. Co.-Carolina Division v. Bennett*, 233 U. S. 80 (1914).

[6]*Jesionowski v. Boston & Maine RR.*, 329 U. S. 452 (1947). *Johnson v. United States*, 333 U. S. 46 (1948). *Chesapeake & O. R. Co. v. Thompson Mfg. Co.*, 270 U. S. 416 (1926).

with which the decision below is in conflict. The decision of the Court of Appeals in this case is also in conflict with a decision of the Court of Appeals for the Third Circuit. *Weigand v. Pa. R. Co.*, 367 F. 2d 281 (C. A. 3, 1959).

The court below also raised a doubt as to, although it did not decide, whether *res ipsa* applies in a situation in which the defendant presents direct evidence of the cause of the accident. Decisions of this Court and of the various courts of appeal including that of the Ninth Circuit indicate that there is no basis for this doubt.[7] As a preliminary step to considering the important question of the nature of the inference of negligence in a *res ipsa* situation, this question should be laid to rest.

The Court of Appeals held that even if *res ipsa loquitur* was applicable it was not error to give an instruction stating the general rule that no inference of negligence can be drawn from the mere happening of an accident. This holding is in conflict with decisions from other circuits and presents an important question which this Court should resolve.

Because of these conflicts and the confusing state of the law clarification by this Court is of great importance to the large volume of Jones Act and other cases involving federal law where the doctrine of *res ipsa loquitur* may be applicable.

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[7] *O'Neill v. B. & O. R. Co.*, 348 U. S. 956 (1955), reversing *Baltimore & O. R. Co. v. O'Neill*, 211 F. 2d 198 (1954). *Miller v. Cincinnati, etc. R. Co.* 317 F. 2d 693, 698 (C. A. 6, 1963). *Bedal v. Hallack & Howard Lumber Co.*, 226 F. 2d 526, 538 (C. A. 9, 1955). *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115 (1893). *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551 (1891). *Great Western R. Co. of Canada v. Braid*, 15 Eng. Rep. 640 (1863). *San Juan Light & T. Co. v. Requena*, 224 U. S. 89 (1912). *Weigand v. Pa. R. Co.*, 267 F. 2d 281 (C. A. 3, 1959).

I.

The Fact That a Defendant in a Case Where the Doctrine of Res Ipsa Loquitur Applies, Offers Direct Evidence of the Cause of the Accident, Does Not Render the Doctrine Inapplicable nor Does It Justify a Refusal to Instruct on the Subject; the Doubt Expressed Below on This Matter Should Be Removed.

Although the court below expressed "considerable doubt" as to whether the instruction on *res ipsa* should have been given "because here direct evidence was not lacking" (App. A, pp. 5-6), the law is definite that the instant case was a proper one for the application of the doctrine, and the giving of an appropriate instruction on it to the jury. This Court in *O'Neill v. B. & O. R. Co.*, 348 U. S. 956, by reversing the decision of the Court of Appeals,[8] made it clear that the introduction of direct evidence concerning the cause of an accident does not eliminate the *res ipsa* doctrine from a case in which it is otherwise appropriate. The Third Circuit had reversed a judgment for the plaintiff, who had relied on the doctrine of *res ipsa*, on the grounds that the defendant's uncontroverted evidence showed that the defendant had not been negligent and that the inference of negligence was thereby effectively dispelled as a matter of law. *Baltimore & O. R. Co. v. O'Neill*, *supra*, 211 F. 2d 190.

Judge McAllister, dissenting in that case, took the position that defense testimony offered to meet the in-

[8]The name of the case below was *Baltimore & O. R. Co. v. O'Neill* (C. A. 3, 1954), 211 F. 2d 190.

ference of negligence is to be weighed by the jury against the inference, except in those cases where the "entire evidence is such that the presumption cannot stand against it," and where the evidence is "so conclusive that the minds of reasonable men could not differ as to the conclusions to be drawn therefrom." He further observed that:

> "It is not enough that the evidence of the defendant would, if true, be sufficient to rebut the presumption, because it is for the jury to pass upon the credibility of the witnesses and the truth of the testimony." [211 F. 2d at 197.]

In a *per curiam* order, this Court reversed the judgment of the Third Circuit, and reinstated the judgment of the District Court. *O'Neill v. B. & O. R. Co.*, *supra*, 348 U. S. 956. That action has been interpreted by the Courts of Appeals for both the Third Circuit and the Ninth Circuit as indicating approval by this Court of Judge McAllister's dissent. *Miller v. Cincinnati, etc. R. Co.*, 317 F. 2d 693, 698 (C. A. 3, 1963); *Bedal v. Hallack & Howard Lumber Co.*, 226 F. 2d 526, 538 (C. A. 9, 1955).

The views expressed by Judge McAllister find additional support in previous opinions of this Court: *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115 (1839); and *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551 (1891). In both of these cases, defendants offered evidence tending to show no negligence on their part, and it was nevertheless held proper to have instructed the jury on principles of *res ipsa*. To the same

effect, see *Great Western R. Co. of Canada v. Braid*, 15 Eng. Rep. 640 (1863).

Indeed, it has frequently been held that the jury may properly be instructed on *res ipsa* even where the plaintiff himself offers direct evidence tending to establish specific negligence on the part of the defendant. See, *e.g.*, *Stokes v. Saltonstall*, *supra*, 13 Pet. 181, 10 L. ed. 115; *San Juan Light & T. Co. v. Requena*, 224 U. S. 89; *Weigand v. Pa. R. Co.*, 267 F. 2d 281 (C. A. 3, 1959); *Texas & Pac. R. Co. v. Buckles*, 232 F. 2d 257 (cert. den. 351 U. S. 984) (C. A. 5, 1956).

Moreover, in the instant case the "explanation" offered by respondents tended to confirm rather than to negate their negligence. The evidence offered by respondents indicated that the fish fell either because the hook was not properly inserted or because with the method of handling the fish when the accident occurred, as distinguished from another method which was sometimes used, the occasional dropping of a fish was unavoidable. (App. A, pp. 2-3.) Thus, according to respondents' explanation, the accident occurred either because of the failure to properly execute the method of work or because of a deliberate choice of a dangerous method. This is hardly evidence which so conclusively negates the *res ipsa* inference of negligence, as to eliminate it from the case.

II.

The Court Below Erred in Holding That the Jury Might Disregard the Res Ipsa Loquitur Inference Whether or Not the Defendant Had Offered Evidence to Meet or Balance It; While the Res Ipsa Doctrine Does Not Shift the Burden of Proof, It Gives Rise to an Inference of Negligence Which Should Prevail Unless the Defendant Presents Evidence to Meet or Balance It.

In this case the facts of exclusive control of the fish by the respondents and of its being dropped on petitioner are not in dispute. The question is whether the jury should have been instructed that the doctrine of *res ipsa loquitur*, applicable to these facts, required a finding in accordance with the inference of negligence unless there was evidence negating the inference of negligence sufficient to meet or balance the inference.

The court below held that such an instruction was improper and that the *res ipsa* doctrine requires merely that when the doctrine applies, the jury be free to accept or reject the inference of negligence, regardless of whether there is evidence to meet or balance it. In this, the holding below appears to rest upon a misreading and misapplication of prior decisions of this Court and of the historic development of the *res ipsa* doctrine.

As early as 1809 it was held in England that the doctrine of *res ipsa loquitur*, as applied to a passenger injured when the axle of a stage coach broke, not only afforded plaintiff a *prima facie* case but rendered it ". . . encumbent on the defendant to make out, that the damage in this case arose from what the law considers a mere accident." *Christie v. Griggis*, 170 Eng. Rep.

1088, 2 Camp. 79. In a case decided in 1893 by this Court the *Christie* case was cited as authority for the proposition that where injuries were caused by a stage coach overturning, the jury was correctly instructed that the facts threw "upon the defendant the burden of proving that the accident was not occasioned by defendant's fault."[9] *Stokes v. Saltonstall,* 13 Pet. 181, 10 L. ed. 115 (1839). To the same effect, *Gleeson v. Virginia Midland Ry. Co.,* 140 U. S. 435; *Kearney v. The London Brighton & South Coast Ry. Co.,* 5 Q. B. 411 (1870), aff'd 6 Q. B. 759 (1871); *Great Western Ry. Co. of Canada v. Braid,* 15 Eng. Rep. 640 (1863).[10]

In 1863, the same principles were applied in a case which did not involve a common carrier-passenger relationship, and it became the text book exemplar of the *res ipsa* doctrine. *Byrne v. Boadle,* 159 Eng. Rep. 299. There a barrel of flour fell from a building and struck the plaintiff who was walking along the sidewalk. The court held not only that an inference of negligence arose from those facts, but that "if there are any facts inconsistent with negligence it is for the defendant to prove them." [159 Eng. Rep. at 301.] See also Halsbury's, *Laws of England* (3d ed. 1959)

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[9]Whether or not this language of the Court intended to indicate that the burden of proof shifted is not entirely clear although the case was so construed in *Sweeney.*[*] However that may be, in a later decision of this Court it is made clear that language of similar import refers not to a shifting of the burden but to the requirement that the defendant is required to offer an explanation if the inference is to be negated. *Southern R. Co.-Carolina Division v. Bennett, infra.* 233 U. S. 80, 85-86 (1913).

[10]"There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the Company to rebut it." [15 Eng. Rep. at 646.]

Vol. 28, page 80; Frederick Pollock, *The Law of Torts* (London Ed., 1887), pages 421-422;[11] *...tt v. London & St. Katherine Docks Co.*, 159 Eng. Rep. 665 (1865).

The law of England on this subject has not changed. In *Moore v. R. Fox & Sons* [1956], 1 All E.R. 182 (C. A. 1955), the Court of Appeals reversed a trial court which had ruled that in a *res ipsa* case the defendant was entitled to judgment if he showed various possible causes of the accident involving no negligence on his part. The appellate court held that in such a case the defendant has the burden of producing evidence to establish (1) that the injury was due to a cause not connoting its negligence or (2) that it used all reasonable care in and about the management of the thing which caused or inflicted the injury. See also, *Walsh v. Holst & Co., Ltd.*, 3 All E. R. 33 (1958).

These principles were applied in the United States in a series of cases involving common carrier-passenger relationships. *Stokes v. Saltonstall, supra*, 13 Pet. 181, 10 L. ed. 115 (1839); *New Jersey R.R. & Transp. Co. v. Pollard*, 22 Wall. 341, 22 L. ed. 877 (1875). However, the application of *res ipsa* was not limited to common carrier-passenger cases. In *Inland & Seaboard Coasting Co. v. Tolson, supra*, 139 U. S. 551 (1891), the principle was held to have been correctly covered by a jury instruction in a case in which a boat allegedly hit a dock with great force and injured a person on

[11] "Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence. In other words, the burden of proof is on the occupier of the building. If he cannot show that the accident was due to some cause consistent with due repair and careful management of the structure, he is liable.

the dock. The instruction which was sustained had the effect of advising the jury that if the boat did in fact strike the dock with such force as to cause damage which would not ordinarily occur, "this would be *prima facie* evidence of negligence . . . unless upon the whole evidence in the case the *prima facie* evidence was rebutted." In *San Juan Light & T. Co. v. Requena*, 224 U. S. 89, where plaintiff's decedent was electrocuted by "a surplus and dangerous" electric current, the jury was properly instructed that "the presumption is that the electric company was negligent; and it devolves upon it to show that the surplus and dangerous current that came over the wires did not occur from any negligence on its part."[12]

The *San Juan Light & T. Co.* case was decided one year before *Sweeney v. Erving, supra*, 228 U. S. 233 (1913); yet *Sweeney* does not mention it, nor have the *res ipsa* principles enumerated in the earlier case, grounded upon a long series of precedents, ever been overruled by this Court. *Sweeney* is susceptible of the construction that *res ipsa* creates no more than an inference which the jury is free to reject even in the absence of any explanatory evidence. However, the precise question there presented was whether *res ipsa* shifts the burden of proof to the defendant. [228 U. S. at 238.] The issue here is whether, without shifting the burden of proof, *res ipsa* requires the defendant to go forward and

[12]The reason for the rule has been stated by Wigmore:
". . . the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him [the defendant] but inaccessible to the injured person." Wigmore, *Evidence*, 1940 ed., Vol. 9, Sec. 2509.

"meet or balance" the inference of negligence in order to prevail. This issue was not before the Court in *Sweeney*;[13] where it was before the Court in earlier cases, it was held that the inference will prevail unless it is met or balanced by evidence tending to clear the defendant of negligence. *Inland & Seaboard Coasting Co. v. Tolson, supra,* 139 U. S. 551; *San Juan Light & T. Co. v. Requena, supra,* 224 U. S. 89.

That *Sweeney* did not intend to lay down a contrary rule is evidenced by the fact that one year after that decision the Court in *Southern R. Co. Carolina Division v. Bennett,* 233 U. S. 80 (1913), restated the principles declared in the *San Juan Light & T. Co.* case. An instruction to the effect that injury from defective instrumentalities which would ordinarily be safe if properly maintained (comparable to injury from a falling fish which would ordinarily not fall if due care were taken) is "*prima facie* evidence" of negligence in an action under the Employers Liability Act, embodied in the Jones Act here involved, "and that the master assumes the burden of showing that he exercised due care . . .". [233 U. S. at 85-86.][14]

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[13]The Court in *Sweeney* recognized this when it said: ". . . Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs; the contention was that it made it necessary for him to prove by a preponderance of the evidence that there was an absence of negligence on his part." [228 U. S. at 239.]

[14]The import of this language was made clear by the Court: ". . . Of course the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition, but merely expressed in an untechnical way that, if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. . . ." [233 U. S. at 85-86.]

Moreover, *Sweeney* cites with approval *Inland & Seaboard Coasting Co. v. Tolson, supra,* 139 U. S. 551, a case not involving a carrier-passenger relationship[15] which held that the *res ipsa* inference had to be met for the defendant to prevail. The Court also cited the passenger cases of *New Jersey R.R. & Transportation Co. v. Pollard, supra,* 22 Wall. 341, 22 L. ed. 877; and *Gleeson v. Virginia Midland Ry. Co., supra,* 140 U. S. 435, in which the Court held that in a *res ipsa* case the inference of negligence would prevail if not met by evidence dispelling it. These cases are cited among others for the proposition that *Stokes v. Saltonstall, supra,* 13 Pet. 181, 10 L. ed. 115, did not hold that the *res ipsa* had the effect of shifting the burden of proof. *Stokes,* like *New Jersey R.R. & Transportation Co.,* and like *Gleeson,* did, however, require the defendant to meet the inference if liability were to be avoided.

Thus when *Sweeney* is read in the light of the cases it cites and of *Southern R. Co.,* decided the subsequent year, and *San Juan Light & T. Co.,* decided the prior year, the conclusion is inescapable that this Court by *Sweeney* actually decided no more than that *res ipsa* does not shift the burden of proof. Despite language which may be subject to a contrary interpretation on an issue not squarely presented to it, the decision should not be construed as overruling the Court's prior decisions and the deep-rooted principle that unless it is balanced or met, *res ipsa* requires a judgment for the plaintiff.

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[15]This is of importance because in *Sweeney* the Court distinguishes *Stokes v. Saltonstall, supra,* 13 Pet. 181, on two grounds, one of which is that it was a passenger case involving the highest degree of care. That the rule of *res ipsa loquitur* extends beyond passenger cases is a matter hardly open to dispute today.

Sweeney has been cited in but three Supreme Court cases, *Chesapeake & O. R. Co. v. Thompson Mfg. Co.*, 270 U. S. 410 (1926); *Jesionowski v. Boston & Maine R.R. Co.*, 329 U. S. 452, 457; and *Johnson v. United States*, 333 U. S. 46. The latter two plus *Sweeney* are the entire authority cited in support of its holding on this point by the court below. In the *Chesapeake & O. R. Co.* case the Court merely held that an inference of negligence was not conclusive where there was evidence "which persuasively tended to exclude the possibility of negligence." [270 U. S. at 423.] Petitioner agrees with this proposition as does the rejected instruction.

The treatment of the inference problem in both *Jesionowski* and *Johnson*, the cases cited by the court below, is *dicta* for in both cases the issue related to whether an alleged error which aided the plaintiff had been committed, and in both cases the plaintiff prevailed. In *Jesionowski* this Court overruled an appellate court's reversal of a plaintiff's jury verdict: the holding of the Circuit Court, which was held erroneous, was that *res ipsa* did not apply because the plaintiff had partial control of the instrumentality causing the accident. In *Johnson*, the Ninth Circuit reversed a judgment for plaintiff where the plaintiff was hit by a falling block, but the cause of the block falling was not shown; the appellate court had held that the accident could have happened without negligence and therefore *res ipsa* did not apply; the Supreme Court reinstated the judgment for the plaintiff. In neither case was the issue presented whether the inference of negligence could have been rejected by the jury without evidence supporting such rejection.

Thus the law as declared by this Court right up to the present time can be summarized as follows. There are a number of decisions, deeply rooted in precedent, supporting the proposition that the *res ipsa* inference may not be rejected without countervailing proof; there are *no holdings* to the contrary, albeit there is language in several cases to the effect that the inference may be rejected by a jury, even though no evidence contrary thereto is given. Petitioner submits that the law requires clarification so that *language* in cases where the issue was not directly involved shall not be substituted for the clear and soundly based *holdings* of this Court.

Sweeney has not always been construed in the manner of the court below. In *Weigand v. Pennsylvania R.R. Co., supra*, 267 F. 2d 281, an F. F. L. A. case, the Court applied *Sweeney* as requiring the giving of an instruction that in a *res ipsa* case ". . . it is incumbent upon the defendant to come forward with evidence to explain the cause of such collapse [*i.e.*, the cause of the accident] and that the defendant exercised due care on its part in providing plaintiff with a safe place to work." This opinion is in conflict with that of the Court of Appeals in this case and that conflict should be resolved.[16]

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[16]Among the state decisions are some which hold that the *res ipsa loquitur* doctrine creates a presumption which shifts the burden of proof. *Greyhound Corp. v. Brown*, 269 Ala. 520, 113 So. 2d 916 (1959); *Weiss v. Axler*, 137 Colo. 544, 328 P. 2d 88 (1958). Others treat the doctrine as a *presumption* which shifts the burden of going forward. *Robinson v. Nightingale*, 188 Kan. 377, 362 P. 2d 432 (1961); *Stocking v. Johnson Flying Service*, ... Mont. ..., 387 P. 2d 312 (1963); *Motte v. First Nat'l Stores*, 76 R. I. 349, 70 A. 2d 822 (1950). Still others treat it as an *inference* which shifts the burden of going forward. *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041; *Siebrand v. Gossnell*, 234 F.2d 81 (1956); *Throop v. F. E. Young & Co.*, 94 Ariz. 146, 382 P. 2d 560 (1963); *Reece v. Webster*, 221 Ark. 826, 256 S.W.2d 345 (1953); *Munzert v.*

III.

Where the Doctrine of Res Ipsa Applies It Is Error to Give an Instruction Stating the General Principle That No Inference of Negligence Can Be Drawn From the Mere Fact That an Accident Happened.

Citing no authority for its holding, the court below ruled that the giving of the following jury instruction, over petitioner's objection that it should not be given in a *res ipsa* case, was not error.

> "The mere fact that an accident happened, considered alone, does not as a rule permit the jury to draw the inference that the accident was caused by someone's negligence."

The essential vice of this instruction is that it rests upon a premise which is at war with that underlying the *res ipsa* doctrine. The law recognizes that under certain circumstances accidents ordinarily do not happen in the absence of negligence. Further, given the defendant's control of the instrumentality of injury in such cases, it regards the negligence as probably that of the defendants. Thus in such cases the happening of the accident does indeed permit the inference of negligent

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American Stores Co., 232 Md. 97, 192 A.2d 59 (1963); *Jacobs v. Beck*, (La.) 141 So.2d 920 (1962); *Cratty v. Samuel Accto & Co.*, 151 Me. 126, 116 A.2d 623 (1955); *Bergley v. Manns*, (N. Dak.) 99 N.W.2d 849 (1959); *Dozens v. Longfellow Corp.* (Okla.) 351 P.2d 909 (1960); *Izzi v. Philadelphia Transportation Co.*, 412 Pa. 559, 195 A.2d 784 (1963); *Moon v. Johnson*, 47 Tenn. App. 208, 337 S.W.2d 464 (1959); *Lund v. Phillips Petroleum Company*, 10 Utah 2d 276, 351 P.2d 952 (1960); *Johnson v. Monongahela Power Company*, ... W. Va. ..., 123 S.E.2d 81 (1961). Probably the most thorough treatment of the *res ipsa loquitur doctrine* will be found in Shain, Mark, *Res Ipsa Loquitur: Presumptions and Burden of Proof* (Los Angeles, Parker & Company, 1945). See also, a law review article by the same author, "Res Ipsa Loquitur", 17 So.Cal.L.Rev. 187 (1944).

conduct. The instruction given runs counter even to the construction of the *res ipsa loquitur* doctrine adopted by the court below which would render the inference permissive only, for it leaves no room for any inference at all from the happening of the accident.

This holding is in conflict with those of other Courts of Appeals. *Carpenter v. Baltimore & O. R. Co.* (C. A. 6, 1940), 109 F. 2d 375; *Fassbinder v. Pennsylvania R.R. Co.* (C. A. 3, 1963), 322 F. 2d 859. *In Carpenter*, it was held that such an instruction was erroneous in a *res ipsa* case. There the instruction was that "the defendant cannot be held liable in this case merely because the lead weight or ball fell and by reason thereof injured plaintiff." The effect of the instruction given in the instant case was to advise the jury that the mere fact that the fish fell and injured petitioner cannot constitute a basis for holding the respondents liable. The two cases are squarely in conflict.

In *Fassbinder*, it was held that in a case where *res ipsa* was applicable but no jury instruction on the subject was requested or given, the doctrine nevertheless applied and the jury could properly infer negligence from the mere happening of the accident. In the present case, assuming *arguendo* that the proffered *res ipsa* instruction was erroneous and therefore properly denied, the holding of *Fassbinder* is that *res ipsa* was nevertheless in the case and the jury could properly base its verdict thereon. Here the jury was told that the general rule of law did not permit such an inference, thus removing *res ipsa* (even as construed by the court below) from the case. Again there is a square conflict.

The court below justifies the giving of the instruction that no inference of negligence could be drawn from

the mere happening of the accident on the ground that it would have been proper as an introduction to a *res ipsa* instruction. If it had been so given, the jury would have been informed that although generally no inference of negligence can be drawn from the mere happening of the accident, in this case it could be. The vice of the instruction is that it tells the jury of the general rule, as though it were applicable to this case, without even an intimation that it is not so applicable.

Conclusion.

The court below in a Jones Act case has construed the doctrine of *res ipsa loquitur* so as to restrict its usefulness to seamen contrary to historically founded principles of common law, as well as to its interpretation in both this Court and many state courts. Yet it has repeatedly been said that the Act should be given a liberal construction in order to accomplish its beneficent purpose of affording protection to seamen. *Cosmopolitan Shipping Company v. McAllister*, 337 U. S. 783, 790 (1949); *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 375 (1932); *Jamison v. Encarnacion*, 281 U. S. 635, 640 (1930); *The Arizona v. Anelich*, 298 U. S. 110, 123 (1936). This Court should give consideration to the question whether, in the light of more liberal precedents including those of this Court, the restricted construction of the *res ipsa* doctrine as applied to Jones Act cases by the court below is warranted. Precedent and the policy of the law in this area would seem to call for a reversal in this case.

BEN MARGOLIS and
JOHN T. McTERNAN,
By BEN MARGOLIS,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Frank Ursich, Appellant, vs. Manuel D. Da Rosa, et al., Appellee. No. 18,409.

[Feb. 26, 1964]

Appeal from the United States District Court for the Southern District of California, Central Divison.

Before: Hamlin, Browning and Duniway, Circuit Judges.

Duniway, Circuit Judge:

Appellant was a fisherman employed aboard the appellees' vessel and was injured while so employed. He brought this action under the Jones Act (46 U.S.C. §688) charging negligence. In a separate count he sought maintenance and cure. The Jones Act count was tried to a jury, which returned a verdict for appellees.

The evidence shows that the appellees' boat, which had returned from a fishing trip, was tied up alongside a dock in San Pedro, California, unloading its catch. The fish were frozen hard. Appellant and a fellow crew member, one Druskovich, were unloading one of the brine tanks located in the middle of the vessel. The tank had an opening 2½′ to 3′ square. It contained fish of varying weights, from 35 pounds to 150 pounds, the larger fish being on top of the smaller ones. The larger fish were taken out first by means of a rope sling attached to a winch. The sling was

placed around the tail of a fish which was then lifted from the hatch and placed nearby on the deck. After the larger fish had been removed appellant entered the tank to unload the smaller fish by means of a bucket which was 2′ to 2½′ square. It was lowered into the tank, filled by appellant, and hoisted out by a winch.

At the time of the injury appellant had filled the bucket and was waiting for the winch to lift it out. His head was in the hatch opening, either at, or just above, or just below the level of the deck. Druskovich, who was on the deck, lifted a tuna that had previously been hoisted out of the tank, and weighed some 130 to 140 pounds, for the purpose of putting it in the bucket on the deck. He did this by grasping the tail with his left hand, then hooking a longshoreman's hook which he carried in his right hand, into the eye of the fish. While the fish was being lifted, the hook came out of the eye and the fish slipped from Druskovich's grasp. It hit the deck, slid into the hatch and struck appellant on the head, shoulders and arm, knocking him down.

Appellant offered testimony of Druskovich, who actually handled the fish, and that of another experienced fisherman. The testimony would support a finding that the fish was handled in the customary manner, but that even when handled in such manner, a fish may be dropped once or twice a day. The accident could have happened because the eye of the fish was soft so that the hook could pull out or because the bone of the fish surrounding the eye broke, or because the hook broke. There was no evidence as to which, if any, of these events occurred. There was, however, evidence that the proper way to place the hook in the eye of a

tuna, in order to prevent it from slipping out, is to insert it under the bone in the eye. It was not proved, however, that Druskovich had done this with the fish that injured appellant. Sometimes with a big fish, and for safety purposes, appellees use a sling instead of the hook. Druskovich knew that it was possible that a fish could fall off the hook. He testified that he did nothing in particular to prevent this fish from doing so.

Appellant assigns four errors. The first is the refusal of his proposed instruction on *res ipsa loquitur*. The second is the giving of an instruction that the mere happening of the accident does not ordinarily permit the jury to draw an inference of negligence. The third is the giving of instruction on contributory negligence, with the proper qualification for a proportionate reduction in damages. The fourth is the denial of interest on the award that was made under the separate count for maintenance and cure.

1. *The proposed instruction on res ipsa loquitur was properly refused.*

The instruction proposed reads as follows:

> "From the happening of the accident involved in this case, an inference arises that a proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence and unless there is contrary evidence sufficient to meet or balance it, the jury should find in accordance with the inference.
>
> "When there is any evidence to the contrary, you must weigh all of the evidence bearing upon the issue of defendant's negligence. If the evidence

tending to prove that the accident was caused by a failure of the defendant to exercise the care required of him has greater weight than the evidence to the contrary, you will find in favor of the plaintiff on that issue.

"In order to meet or balance the inference of negligence, the defendant must present evidence to show either (1) a satisfactory explanation of the accident, that is, a definite cause for the accident, in which there is no negligence on the part of the defendant, or (2) such care on the defendant's part as leads to the conclusion that the accident did not happen because of want of care by him, but was due to some other cause, although the exact cause may be unknown. If such evidence has at least as much convincing force as the inference and other evidence, if any, supporting the inference, then you will find against the plaintiff on that issue."

This being an action based upon an act of Congress, we are bound by Federal Law, as announced by the Supreme Court. (*Cf. Garrett v. Moore-McCormack Co.*, 1942, 317 U.S. 239)

In *Sweeney v. Erving*, 1913, 228 U.S. 233, which involved an injury to the plaintiff by X-ray burns, the trial court was asked to instruct the jury, in substance, that the occurrence of the accident was itself evidence of negligence and cast upon the defendant the burden of proving, by a preponderance of the evidence, that the injury was not caused by his negligence. The court held that this instruction was properly refused, saying:

"In the view we take of the matter, it is not necessary to pass upon the question whether the

evidence presented a case for the application of the rule *res ipsa loquitur;* for the reason that in cases where that rule does apply, it has not the effect of shifting the burden of proof." (p. 238)

. . . .

"In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." (p. 240)

This decision was cited with approval in *Jesionowski v. Boston & Maine R.R.*, 1947, 329 U.S. 452, 457. In that case the Court described the *Sweeney* decision as one "which cut through the mass of verbiage built up around the doctrine of *res ipsa loquitur.*" It then quoted with approval the language that we have quoted above. The *Sweeney* case was also cited with approval in *Johnson v. United States*, 1948, 333 U.S. 46.

While we have considerable doubt about it, because here direct evidence was not lacking, we assume, as the Court did in *Sweeney*, but do not decide, that this is a

case in which the court should have given an instruction on the doctrine of *res ipsa loquitur*. We hold, however, that the instruction proposed is subject to the same criticism as the instruction in the *Sweeney* case. The first paragraph of the instruction directs the jury to find in accordance with the inference "unless there is contrary evidence sufficient to meet or balance it." The second paragraph of the instruction tells the jury to weigh the inference where there is evidence to the contrary, thus implying, as the first paragraph flatly states, that the jury *must* accept the inference, rather than *may* accept it, in the absence of such contrary evidence. Yet in *Sweeney* the Court said that the doctrine means that "the facts of the occurrence warrant the inference of negligence, *not that they compel such an inference.*" (Emphasis added) The third paragraph of the instruction requires the defendant, in order to meet or balance the inference, to present evidence to show either a definite cause for the accident, not involving negligence, or due care, showing that the accident was not caused by negligence. Yet in *Sweeney* the Court pointed out that where the doctrine is applicable it means only that the facts "call for an explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense."

In other words, in drawing their proposed instruction, counsel for appellants fell into a common error. They asked the court to instruct upon a subject as to which we assume they were entitled to an instruction, but they framed an instruction which stated the doctrine in a manner more favorable to them than the law

permits. The court was under no duty to redraw their instruction for them.[1] It properly rejected it.

2. *It was not prejudicial error to give the "mere fact that an accident happened" instruction.*

The instruction given reads:

> "The mere fact that an accident happened, considered alone, does not as a rule permit the jury to draw the inference that the accident was caused by someone's negligence."

This instruction merely states, in general terms, the ordinary rule in accident cases. It is as applicable to appellees' claim that appellant was negligent as it is to appellant's claim that appellees were negligent. It is limited by the phrase "as a rule." The court did leave to the jury, under instructions that are not criticized, the right to decide whether appellees were negligent. The criticized instruction is not inconsistent with them. It does not tell the jury that they cannot consider all of the circumstances shown by the evidence in deciding the issue of negligence *vel non*. Presumably, the jury did consider them.

But appellant says that this is a *res ipsa loquitur* case, that the instruction is clearly contrary to that doctrine, and that therefore it was error to give it.

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[1] *Wong v. Xavier*, 9 Cir., 1959, 267 F. 2d 749, 761; *Omaha Packing Co. v. Pittsburg, F. W. & C. Ry. Co.*, 7 Cir., 1941, 120 F. 2d 594 (a *res ipsa* instruction case); *Howard v. Capital Transit Co.*, D. C. Cir. 1947, 163 F. 2d 910; *Southern Ry. Co. v. Jones*, 6 Cir., 1955, 228 F. 2d 203; *Cherry v. Stedman*, 8 Cir., 1958, 259 F. 2d 744. The rule is an old one, and we are entitled to expect counsel to be aware of it and to frame proper instructions instead of framing improper ones that will, if accepted, lead the court into error. (*Catts v. Phelan*, 1844, 43 U. S. (2 How.) 375.) The *Sweeney* case itself in fact applies it, but without saying so.

This is not necessarily so; as an introduction to a proper *res ipsa* instruction, the criticized instruction would have been proper and would have protected appellant against any inference, arising from the accident, that he was negligent. We find here no prejudice in giving the instruction.

3. *It was not prejudicial error to give the instruction on contributory negligence.*

The instruction is as follows:

> "If you should find that the defendant was guilty of negligence which proximately caused injury to the plaintiff, and further find that the plaintiff was guilty of some negligence which proximately contributed to his injury, then the total damages awarded the plaintiff must be diminished or reduced by you in the proportion that the amount of contributory negligence chargeable to the plaintiff compares to the amount of negligence chargeable to the defendant."

Appellant asserts that the evidence would not support any finding that he was contributorily negligent and that therefore the giving of the instruction was error. But assuming that appellant is correct in his view that a finding of contributory negligence would not be supported, the instruction was not prejudicial here. In these cases, the rule of comparative negligence, stated in the instruction, applies. It is never a complete defense; and the court did not tell the jury that it is. Here the verdict was in favor of the appellees. This can only mean that the jury found that they were not negligent. Under these circumstances, contribu-

tory negligence, if any, becomes immaterial. It follows that the instruction could not have been prejudicial.

4. *There was no error in refusing to award interest.*

Absent some peculiar facts, an award for maintenance and cure carries interest. (*Medina v. Erickson*, 9 Cir., 1955, 226 F. 2d 475, 484) At the conclusion of the trial, counsel stipulated to the amount, at a daily rate, for certain days. Appellant's counsel then asserted that he wished to have interest awarded on a weekly basis on the amount agreed upon. Appellees' counsel objected, stating: "I object to that. I stipulated to this in the interest of speeding this matter up. I think we might very well have two contentions, one as to whether or not, despite the Public Health fit for duty, he might have gone back to fishing before March 1961 and whether or not some of this period was a result of diabetes." The court declined to award interest. When the stipulation was made, counsel for appellant did not mention interest; he first stated his claim immediately afterward. At that point appellees' counsel objected, as shown above. Yet appellant's counsel did not suggest that the stipulation be reopened. He wants to have his cake and eat it too. It appears that the stipulation was a compromise and we think that this constituted sufficient "peculiar facts" to justify the denial of interest under the circumstances. Appellant waived findings on this issue, and hence cannot claim that there is error because no "peculiar facts" were found. (*Cf. The Madison*, 9 Cir., 1937, 91 F. 2d 835, 847)

Affirmed.

APPENDIX B.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Frank Ursich, Appellant, vs. Manuel D. Da Rosa, et al., Appellees. No. 18409.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

APPENDIX C.

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, April 7, 1964.

Before: Hamlin, Browning & Duniway, Circuit Judges.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed March 26, 1964, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D.

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

[United States Code. Title 46, Sec. 688.]